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CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Petitioners*,

v.

JOSEPH CARROLL, ET AL., *Respondents*.

No. 310

JOSEPH CARROLL, ET AL., *Petitioners*,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE AMERICAN FEDERATION OF MUSICIANS, ET AL.

I. PLAINTIFFS' BRIEF IS A HODGEPODGE OF "FACTS" OUTSIDE THE RECORD AND CONTENTIONS NOT LITIGATED BELOW.

By the time a case reaches this Court for adjudication the process of litigation has normally eliminated all factual issues, and sharpened and confined the legal issues which this Court has agreed to hear. The briefs of the parties are therefore required to address themselves to those legal issues and to avoid the introduc-

tion of extraneous matter which can only obstruct the deliberative process. Plaintiffs, however, expand, the areas of legitimate disagreement by either disputing or disregarding the factual findings below and by injecting into the case numerous allegations of illegal activity by defendants not litigated or passed upon below. We do not wish to compound the imposition on the Court by following plaintiffs into all these back-alleys of disputation. However, because of our prior experience in this litigation, where this technique has succeeded all too frequently in confusing matters, we feel obliged to demonstrate in summary fashion the manner in which plaintiffs misstate the record and argue matters not properly before the Court.

Plaintiffs continually invite this Court to find the facts for itself (See, *e.g.* pl. br. pp. 10-11, 12-14, 14-29, 32-33, 38, 43-44, 47, 69, 79, 84-86, 88, 90, 100-103) and include burdensome sets of string citations to the record (*id.* at 12-14, 43-44, 47, 79.) The Court is asked to establish the facts also from a book not in the record (*id.* pp. 14-29, 84-86), from facts found in other cases on other records (*id.* pp. 3, 48, 91) and by reliance on what "attorney for cross-petitioners has been unable to discover" (*id.* p. 90).) Plaintiffs expressly disagree with the District Court's findings (pl. br. 14, 14-15, 19, 43, 86, 100),[1] at one point contrary to their own stipulation

[1] For example plaintiffs say: "Indeed, the record is so conclusive on this subject, that one is left wondering how the Trial Court could, upon the basis of record evidence, have concluded that orchestra leaders and their sidemen, when making recordings, are the 'employees' of the recording company." (pl. br. p. 19) But the District Court cited copious "record evidence" to support these findings (Nos. 58-72 App. 136-138), and the Court of Appeals agreed. (App. 184-185). See also p. 2, n. 2 of our Brief in Opposition in No. 310.

before trial. (Compare pl. br. p. 43, with Finding No. 79, App. 142, based in part on Stipulated Fact 27, App. 107.) The District Court's findings were meticulously annotated to the transcript of a lengthy trial, the voluminous exhibits, the admissions and the stipulations; they were left undisturbed by the Court of Appeals. Plaintiffs do not even render passing obeisance to the settled rule that this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious or exceptional showing of error", *e.g. Graver Tank and Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635, much less meet its requirements. Throughout their brief, plaintiffs make factual assertions, which are to put it most generously, unreliable,[2] and legal contentions which are quite remarkable.[3]

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[2] While we do not wish to burden the Court with a lengthy argument concerning these often irrelevant factual assertions, we will compare for purposes of illustration a few of these assertions with the record evidence:

(1) plaintiff asserts that one Levitt acts as a sideman only . . . "two or three times a year and then only as an accommodation for a fellow orchestra leader who suddenly needed a replacement." (Pl. br. p. 74). Levitt testified that he worked

(Continued on page 4)

[3] Plaintiffs customarily dispose of inconvenient statutes or decisions by casually attacking and then ignoring them. Thus, the definition of a labor dispute in Norris-LaGuardia is dismissed as "quite irrationally inclusive", and plaintiffs argue that its literal breadth requires judicial limitation. Pl. br. p. 71. But compare *Order of Telegraphers* v. *Chicago Northwestern Railway Co.*, 362 U.S. 330, 335. With equal blandness, the brief-writer charges that this Court "mischaracterized" the facts in *Allen Bradley Co.* v. *Local 3*, 325 U.S. 797, Pl. br. p. 56.

Plaintiffs also raise a large number of claims of illegality which were not included in their complaints or the issues stated for trial in the pre-trial order and were not passed on by the courts below. While plaintiffs presented 27 questions in the Petition for Certiorari, there are a considerable number of contentions in the brief that were not raised in the Petition.[4] (See, e.g., pl. br. pp. 5, 12, 31, 49, 70, 91, 92, 93). At pages 94-99 plaintiffs list fifty-four separately-numbered union practices which they assert were encompassed by their "claim of union monopoly *** before the Courts below." (Pl. br. p. 94). One wonders how those Courts overlooked them.

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as a sideman about 25 times in five years (TR. 577) and there was no testimony that he did so for any reason other than a desire to increase his income. (2) Plaintiffs erroneously stated that Carroll and Peterson were expelled, *inter alia*, for failing to charge the minimum prices promulgated by the union. (Pl. br. p. 50). The District Court found that they were expelled for other reasons, (Findings 4 and 5, App. 125-126) and as recently as their Opposition to the Petition for Certiorari (p. 9), Plaintiffs stated that Carroll and Peterson had been expelled as a reprisal for the institution of the instant suits. (3) Plaintiffs also habitually resort to the technique of the half-truth. Thus, they state that defendants never bargain collectively (Pl. br. p. 62) despite findings that there is bargaining in areas other than club dates (App. 153 *et seq.*). Their transcript reference (TR. 26) is to testimony that the AFM does not bargain on single engagements.

[4] We do not understand the Court's grant of *certiorari* on plaintiffs' Petition (No. 310) to have been intended as *carte blanche* to raise here matters not litigated below; we assume rather that the Court wished to take up the entire case, and was unwilling to undertake the burden to winnow the wheat from the chaff in plaintiff's petition. Of course the Court is not bound thereby to consider issues which a fuller examination shows not to be properly or clearly presented by the record. See, e.g. *Mishkin* v. *New York*, 383 U.S. 502.

We cannot believe that plaintiffs seriously contemplate that the Court will decide these newly raised issues. Rather, we must view this as a deliberate effort to paint the unions as malefactors in the hope that they will be treated accordingly.[5]

The final imposition upon this Court is plaintiffs' extensive reliance upon a book by one George Simon, published after the decisions below which deals with a segment of the music industry not involved in this case.[6] We see no need—since it characterizes itself—to

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[5] Some of the assertions are not remotely related to the antitrust laws. At p. 12, plaintiffs argue that payments to the Steady Engagement Welfare Fund violate § 302 of the Taft-Hartley Act. Even if correct, this would have no place in this case. But it is not only incorrect, it is preposterous. The only payments prohibited by § 302 are those by "employers" to the representatives of "their employees". And plaintiffs incorrectly assume that leaders are employers on non-club dates although the Court below indicated to the contrary. (App. 184.)

[6] It merely compounds their imposition on this Court's processes that plaintiffs fail to point out that the book deals with "name bands" whose operations and economics are substantially different, who rarely if ever perform club dates, and to whom plaintiffs do not belong, as the District Court expressly found (App. 150). Having attempted and failed to assimilate themselves to name bands at trial, plaintiffs now resort to this book fortuitously published during the pendency of this appeal, to achieve the same result.

Solely for the convenience of the Court, we quote in full Simon's sole reference to Cutler (at p. 505), of which plaintiffs make so much:

> "Ben Cutler, a good-looking Yale graduate who once made headlines when he drove his car into New York's East River, led one of the more musical society bands that featured a good accordionist, fiddler and a pianist with the unlikely name of Seymour Fiddle, plus a talented and pretty vocalist-pianist with the likely name of Virginia Hayes."

None of the other plaintiffs is mentioned as a leader in the book.

comment elaborately on the effort to use this book as a means of assaulting the fully supported and carefully documented findings below. This Court reviews judgments, not books.

The apparent purpose of plaintiffs' desperate effort is their desire to paint a picture of the club date field different than that accurately found by both courts below. The true picture was best summarized by Judge Friendly in his separate Opinion:

> "***Beginning with the single sideman leading himself, this ranges through the sideman who picks up two or three engagements a year as leader of a larger group, the performer who spends a fair portion of this time as leader, the musician who does nothing but lead, and exclusive leader having several bands with engagements at the same time, up to the few leaders who have ceased to lead at all. Obviously, this means a high degree of interchangeability in work functions and competition among Union members for posts as leaders." (App. 204)

Judge Anderson, for the majority, described the field similarly, "[t]he same orchestra leaders who are 'employers' in the club date field are very often 'employees' when they perform as sidemen or sub-leaders or when in other fields the purchaser of the music is actually the employer." (App. 202). And the District Court found:

> "35. Such musicians who work as sidemen in club date or non-club date fields perform as leaders in the hotel steady and club date fields. They bid for the same jobs as full-time leaders such as plaintiffs and perform the same musical service when they get a job. They also perform in the same places as

full-time leaders (2291, 2553-54, 2571, 2395-96, 2411-12, 2422-23, 2427, 2428-30, 2874-75, 2889-90, 2894, 3038-40, 3052-54, 3088-89, 3293, 3653-54, 3666-68, Exs. 58 DE, pp. 188-89, HE; F.F. 29),"

Defendants fully concede the fact—universally recognized long before Mr. Simon's book—that some musicians (both leaders and sidemen) achieve great reputations because of their unique talents and personalities. But defendants have no less a right to regulate their minimum compensation for working as musicians than does the Screen Actors Guild to regulate the minimum wages of big-name movie stars or, for that matter, the right of the Carpenters Union to regulate the minimum wages of uniquely gifted carpenters. The plaintiffs cannot, by egregiously improper invocation of and reliance upon matters outside or in flat contradiction of the record evidence, or by any other means, escape the fundamental fact that performing leaders are "job threats" (App. 202) to subleaders and sidemen. See pp. 8-9 *infra*.

II. DEFENDANTS HAVE NOT "COMBINED" IN VIOLATION OF THE ANTITRUST LAWS.

A. Admitting Leaders into Membership.

Plaintiffs' major theory is that defendants subject themselves to the rule of *Allen-Bradley Co.* v. *Local 3, IBEW* by accepting them and other leaders who operate as they do into membership. Pl. br. p. 45. Such leaders, they assert, are a "non-labor group," and membership in the union is a "combination". In disputing the holding of the Court of Appeals that this case does not come within *Allen-Bradley,* they are especially critical of what they consider to be the Court's errone-

ous failure to recognize that their membership in defendant unions is a "combination". (Pl. br. p. 64).

Even if this argument is accepted in its entirety, it does not establish a combination *in violation of the antitrust laws.*[7] The fact that not every "combination" violates the antitrust laws does not require elaboration. *Meat Drivers* v. *United States,* 371 U.S. 94, held that the decisive economic reality in determining whether unions may lawfully admit particular persons into membership is *not* simply whether they are *"self-employers or entrepreneurs,"* as plaintiffs would have it (Pl. br. p. 59, emphasis in original).[8] Rather, it is the existence of job and wage competition or other economic interrelationship between the union's members and such self-employed entrepreneurs. 371 U.S. at 103, see also *id.* at 98. Thus, if leaders are in job and wage competition with defendants' employee members, they do not, by joining in a union with them, participate in a "combination" forbidden by the antitrust laws.

The District Court found leaders such as plaintiffs to be in job and wage competition with subleaders (Findings 36-38, App. 131), and with sidemen (Findings 43-45, App. 132). The Court of Appeals agreed. (App. 199 and 202). Plaintiffs dispute its existence, but the Two-Court rule renders extensive examination

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[7] Since both courts below held that leaders are employees in fields other than club dates, the union could admit them into membership without violating the antitrust laws for that reason alone. (App. 168, 202).

[8] This is in contrast to plaintiffs' earlier position, which correctly understood the concluding paragraph of *Meat Drivers* but sought to escape its authority by characterizing it as "diffuse" and "unrealistic" *dictum* (Pet. for cert. No. 310, pp. 20, 30).

of their assertions unnecessary.[9] It is enough to observe that these findings, which both courts considered central to their holdings, are amply supported by the record, *e.g.*, TR., 524, 842-843, 1353, 3657.[10]

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[9] At one point their tortuous argumentation actually leads plaintiffs to the following:

> "When an orchestra leader employs a subleader, he multiplies work opportunities for such employee-musicians. If the leader performs an engagement (because the client insists on the leader's presence), the leader does not *displace*, as the court below held, a subleader. He merely *does not hire one.*" (Pl. br. p. 9, emphasis in original)

The musician who does not get the job will fail to appreciate the distinction. Plaintiffs do not explain its legal significance—it obviously has none. Workers have as much right to combine to obtain employment as to preserve it. The distinction is particularly empty where, as is true of the club date field, fixed employment is almost nonexistent.

We have used this example purely for illustrative purposes, but we do not thereby concede its factual accuracy. This case must, of course, be decided on its merits, and the quoted passage, though consistent with the ultimate conclusion which we urge, is based on plaintiffs' own version of the facts, which are not to be discovered in the record or the findings.

[10] Thus, plaintiffs' witness Sherry, an orchestra leader who plays the accordion, testified (TR. 1313-14):

"Q. In the instance where you had a sub-leader, would there be occasions where in that case you would be required to furnish an accordion player? A. Yes."

"Q. In such a case since you could not personally appear there did you hire another accordion player to replace yourself? A. Yes."

Again, plaintiffs' witness Flatte, an orchestra leader who plays the drums, testified with respect to engagements at which a drummer was called for but at which he could not personally appear and play the drums (TR. 1376):

"Q. And in such a case would you engage the services of a drummer? A. Yes, I would engage the services of a drummer if a drummer was called for on the job."

B. The Regulations Affecting Leaders Do Not Constitute an Illegal Combination.

We have shown that defendants do not create an illegal combination by admitting leaders into the union. While membership itself is plaintiffs' main target,[11] they also challenge the particular regulations governing leaders. But just as the existence of job and wage competition means that the union may admit leaders into membership, so the existence of such job and wage competition furnishes the predicate for lawful union regulation of all musicians, including leaders. The union must be permitted to achieve those objectives which justified bringing the persons involved into the union. *Meat Drivers* did not contemplate a sterile privilege; the court in *Meat Drivers* relied upon earlier decisions, most notably *Milk Wagon Drivers* v. *Lake Valley,* 311 U.S. 91, which had upheld union attempts to regulate independent contractors and derived from those cases the test it applied to determining permissible membership. (See Brief of AFM, pp. 45-47.) In terms of this case, this means that defendants must be permitted to adopt regulations which protect the labor standards of employee musicians. In our opening brief we demonstrated that this was the purpose and the effect of each of the regulations challenged herein and passed on below. Because plaintiffs treat only sporadically and cryptically with such, our discussion of the individual regulations can be brief.

Plaintiffs' approach to the legality of the regulations fixing the minimum compensation of the leader is to call them "price-fixing". But this is not an adequate

[11] NAOL states batly, "If orchestra leaders are businessmen, they should not be union members." (NAOL br. p. 37).

substitute for examination of the economic realities, even if the word "price" is printed in italics (Pl. br. pp. 41, 42, 50, 51, 56, 70, 80, 82, 83), or preceded by the adjectives "naked" and "stark" (Pl. br. pp. 41, 43).[12] We have shown in our main brief that the "crucial determinant is not the "form" but the reality of the union's efforts and we need not, therefore, dwell on the plaintiffs' addiction to unhelpful verbal labels.

With respect to the closed shop, minimum quotas, and traveling regulations, plaintiffs make the common argument that they may not lawfully be applied to employers. But the union has as much right—for purposes of the antitrust laws—to protect the job opportunities of employee musicians from non-union or foreign leaders as from leaders who undercut employee scales. As the Court of Appeals held, the fact that the leaders are "job threats" to employee members renders the unions' attempt to obtain a closed shop a "legitimate union concern." (App. 202.) The argument that the minimum quotas are unlawful because they include the leader (Pl. br. pp. 80-81, 93-24), is simply meaningless. Since obviously there will be someone performing the functions of leader on every musical engage-

[12] Nor is "profit," to which NAOL is partial, any more useful. (NAOL br. pp. 8, 18, 31). NAOL would distinguish *Teamsters Union* v. *Oliver*, 358 U.S. 283, on the basis that the union there "did not attempt to negotiate a profit for the owner-driver" (NAOL br. p. 31). But the union requirement here that the leader receive a minimum return for his performance is no more the negotiation of a "profit" than the requirement in *Oliver* that the owner-operator receive the union wage plus a fair rental. See the discussion of *Oliver* in *Jewel Tea* quoted at p. 38 of our main brief. NAOL is further in error when it says that in *Oliver* the owner-driver "had actually assumed an employee status." *United States* v. *Drum*, 368 U.S. 370, 382, n. 26, quoted at p. 38, n. 13 of our main brief.

ment, the result is the same whether the quota is calculated in terms of the number of sidemen (as plaintiffs insist), or in terms of the total number of musicians on the engagement (that is, the sidemen plus the musician performing the leader function.)

Our main brief anticipates everything that plaintiffs have said with regard to the regulation requiring the use of the Form B Contract, except the charge that it "explicitly incorporates, by reference, all AFM and Local bylaws (including those which offend antitrust laws)". (Pl. br. p. 83). The reason we did not anticipate this contention is because like many other contentions in plaintiff's brief it was outside the complaint and not litigated below.[13] Plaintiffs do not even now specify which are the offending bylaws, but apparently wish this Court to undertake a general examination of the bylaws. The effort need not be made because plaintiffs misstate the facts. The contract incorporates those bylaws only "to the extent permitted by applicable law" (App. 19, last paragraph before bold type). See *Labor Board* v. *News Syndicate,* 365 U.S. 695.

Plaintiffs say nothing which detracts from the demonstration in our main brief that the regulations of booking agents and caterers are necessary to preserve union standards. See Brief of AFM, pp. 67-70. Accordingly, no reply is called for here.

Plaintiffs object generally to all the foregoing regulations on the ground that they are not the product

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[13] As the Court of Appeals found, the complaint does not allege that any specific provisions in the Form B are in restraint of trade. (App. 201.)

of collective bargaining between the union on the one hand, and leaders on the other. They argue:

> *Jewel Tea* was the product of collective bargaining, which defendant Unions here have always spurned and eschewed. How, then, can the policy considerations be the "same" for the purposes of appraising, against "labor dispute" criteria, the defendants' bylaws and activities? How can *dictatorial imposition* of "terms and conditions of employment" be equated to elaboration thereof by *collective bargaining*? (Pl. br. pp. 75-76, emphasis in original).

This argument was disposed of in *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195. It was there urged that a strike in breach of a collective bargaining agreement is not a "labor dispute" because Section 2 "contains language indicating that one primary concern of Congress was to insure workers the right 'to exercise actual liberty of contract' and to protect 'concerted activities' for the purpose of collective bargaining.'" (*Id.* at 201).

This Court held to the contrary:

> "In the first place, even the general policy declarations of § 2 of the Norris-LaGuardia Act, which are the foundation of this whole argument, do not support the conclusion urged. That section does not purport to limit the Act to the protection of collective bargaining but, instead, expressly recognizes the need of the anti-injunction provisions to insure the right of workers to engage in 'concerted activities for the purpose of collective bargaining *or other mutual aid or protection.*' Moreover, the language of the specific provisions of the Act is so broad and inclusive that it leaves not the slightest opening for reading in any excep-

tions beyond those clearly written into it by Congress itself.

> We cannot ignore the plain import of a congressional enactment, particularly one which, as we have repeatedly said, was deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction." (*Id.* at 202-203, emphasis in original).[14]

Plaintiffs say also:

> "Nor are the travel restrictions here, except by self-interested union nominalism, properly designated by defendant Unions as 'terms or conditions of employment.' Real 'terms or conditions' must be bargained, or at least there must be a good-faith attempt to bargain them by the Unions, if there is to be exemption from the Sherman Act because of the Norris-LaGuardia Act." (Pl. br. pp. 79-80).

We had always supposed that even workers in unorganized plants have "real" terms and conditions of employment.

C. Other Allegedly Illegal Forms of Combination.

Plaintiffs also assert that defendant unions unlawfully combine with hotels, restaurants, phonograph recording companies, broadcasters and other purchasers of music. (Pl. br. pp. 12, 60, 88-89). Their theory is that the unions enter into collective bargaining agreements with these enterprises which cover leaders, and

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[14] We note that the dissenting justices did not deny that there was a labor dispute but held on other grounds that certain strikes in breach of contract were nonetheless subject to injunction. (*Id.* at 215-229). See also *Teamsters Union* v. *Yellow Transit Freight Lines*, 370 U.S. 711 (concurring opinion), where these justices voted to reverse an injunction against a strike in breach of contract.

that this is somehow prohibited by *Mine Workers* v. *Pennington,* 381 U.S. 657.[15] But this strange theory ignores the findings below that leaders are employees in those fields in which the union has collective agreements (App. 184-185) and is a drastic distortion of the *Pennington* opinion. That opinion treated with an agreement between a union and one set of employers having the objective of imposing wage standards on the latter's competitors in order to drive those competitors out of the industry. Here there is simply no competition between the leaders and the recording companies, et al., much less an attempt to drive anyone out of any given industry. Put otherwise, we are here dealing with an agreement covering one group of workers in one bargaining unit. Plaintiffs' effort to bring themselves within the language of *Pennington* by the assertion that "none of the alleged collective bargaining agreements defines a *bargaining unit,*" (Pl. br. p. 12, emphasis in original) is, of course, an absurdity.[16]

As to the plaintiffs' argument regarding caterers, the short answer is that there is no combination, by agreement or in any other form, see Findings 120-122, App. 151-153, nor have plaintiffs here argued that the regulations themselves are invalid. While the defendant

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[15] No such theory was raised in the complaint, litigated at trial or passed upon in the District Court. It made its first appearance in the brief to the Court of Appeals which rightly declined to consider it. In short, like many of plaintiffs' other theories of liability, it is as untimely as it is unmeritorious.

[16] The unions' collective bargaining agreements of course define the bargaining units. See, e.g., Ex. #FG 1, pp. 1-2, 5. The District Court found that the AFM has been certified by the Labor Board as the collective bargaining agent for all musicians, including orchestra leaders who perform services for recording companies. (Finding 60; App. 136).

AFM licenses booking agents, and requires them to agree to preserve certain conditions, this does not constitute a "combination" in violation of the antitrust laws, as Judge Levet held (App. 173-175). See also pp. 67-69 of our opening brief. Plaintiffs do not address themselves to Judge Levet's reasoning, contenting themselves with repeated conclusionary statements that combination with booking agents is unlawful. These do not call for reply.

CONCLUSION

For the reasons stated herein and in our main brief, the holding of the Court of Appeals challenged in No. 309 should be reversed but the remainder of its judgment should be affirmed.

Respectfully submitted,

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